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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION THREE

MITSUWA CORPORATION, Plaintiff, Respondent, and Cross-Appellant, v. C. FREDERICK WEHBA II et al., Defendants, Appellants, and Cross-Respondents,	B284741 Los Angeles County Super. Ct. No. BC463929
MITSUWA CORPORATION, Plaintiff and Respondent, v. C. FREDERICK WEHBA II et al., Defendants; YOUNG, ZINN, & BATE LLP, Third Party and Appellant.	B286994 Los Angeles County Super. Ct. No. BC463929

APPEALS from judgments and a post-judgment order of the Superior Court of Los Angeles County, William A. MacLaughlin and Edward B. Moreton, Judges. Reversed in part and dismissed in part; order to show cause is discharged.

Schreiber & Schreiber, Edwin C. Schreiber, Eric A. Schreiber, and Ean M. Schreiber for Defendant, Appellant, and Cross-Respondent C. Frederick Wehba II.

Bate & Bate and David H. Bate for Third Party and Appellant Young, Zinn, & Bate LLP.

Carothers DiSante & Freudenberger LLP, David G. Hagopian and Jeffrey L. Sikkema for Plaintiff, Respondent, and Cross-Appellant Mitsuwa Corporation.

INTRODUCTION

Plaintiff Mitsuwa Corporation (Mitsuwa) sued a group of defendants, including C. Fredrick Wehba II (Wehba), after they defaulted on a pair of promissory notes issued as partial payment for two parcels of property they purchased from Mitsuwa. Mitsuwa and defendants later signed a settlement agreement through which defendants agreed to pay Mitsuwa $15 million to settle Mitsuwa's claims. Under the terms of the agreement, if defendants made their first two payments totaling $10.5 million in full and on time, they would not be required to pay Mitsuwa the remaining $4.5 million. In October 2016, after defendants failed to make their second payment, Mitsuwa obtained a judgment against defendants for more than $11 million. Wehba later filed a motion to vacate the judgment, arguing it was based on an unlawful penalty provision included in the parties' settlement agreement. The trial court granted Wehba's motion

and entered an amended judgment reducing Mitsuwa's award against defendants.

In the first set of appeals (B284741), Wehba appeals, and Mitsuwa cross-appeals, from the amended judgment. Mitsuwa contends the court erred in finding the October 2016 judgment was based on an unlawful penalty provision included in the parties' settlement agreement. For his part, Wehba contends: (1) the court erred when it amended, rather than vacated, the October 2016 judgment after granting his motion to vacate; and (2) the court erred when it awarded Mitsuwa prejudgment interest as part of the amended judgment because the settlement agreement did not include a provision for interest on any defaulted payment. We conclude the court erred by granting Wehba's motion to vacate the October 2016 judgment and direct it to reinstate that judgment.

In the second set of appeals (B286994),[1] Young, Zinn, & Bate, LLP (YZB), the law firm that represented Wehba in the trial court, appeals from a post-judgment order issued under Code of Civil Procedure[2] section 701.020 in July 2017 and a separate judgment entered under section 720.390 in November 2017, both of which were issued to enforce Mitsuwa's judgment against defendants. As we explain, YZB's appeal from the July 2017 post-judgment order is untimely, and its appeal from the November 2017 judgment is moot. We dismiss both of YZB's appeals and discharge the order to show cause.

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[1] On our own motion, we consolidated the two sets of appeals for purposes of decision only.

[2] All undesignated statutory references are to the Code of Civil Procedure.

FACTS AND PROCEDURAL BACKGROUND

1. The Underlying Dispute

Mitsuwa operates retail stores that sell Japanese groceries and food products. Prior to 1997, Mitsuwa owned two parcels of real estate—one in Torrance, California and the other in Costa Mesa, California—where it operated two of its stores. In 1997, Mitsuwa sold the Costa Mesa and Torrance properties.

Mitsuwa had originally negotiated the sale of the properties with Wehba and Bentley Forbes Group, LLC (Bentley Forbes), a company owned by Wehba and members of his family. But shortly before the sales were finalized, Bentley Forbes or the Wehba family created two pairs of companies, each of which consisted of a parent and a subordinate company, to act as the purchasers of the properties to facilitate the "sale/leaseback" agreements the parties used to complete the transactions. The parent company associated with the sale of the Costa Mesa property was called "YCMC Holding, LLC," (YCMC Holding) and the parent company associated with the Torrance property was called " YTC Holding LLC" (YTC Holding).[3]

Mitsuwa sold the Costa Mesa property for $11 million, with defendants agreeing to pay $7 million at closing and the remaining $4 million through a "20-year promissory note," and it sold the Torrance Property for $13.5 million, with defendants agreeing to pay $9.3 million at closing and the remaining $4.2 million through a "20-year promissory note." Defendants stopped making payments on the promissory notes in June 2009.

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[3] We sometimes collectively refer to the Wehba family, Bentley Forbes, and the companies created to facilitate the sale of the properties as "defendants."

In January 2010, Mitsuwa filed two complaints, one against YCMC Holding for breach of the promissory note from the sale of the Costa Mesa property and one against YTC Holding for breach of the promissory note from the sale of the Torrance property. In May 2010, the trial court entered default judgments against the two companies: one against YCMC Holding for $2,555,399.40 and one against YTC Holding for $2,683,141.46.

In June 2011, Mitsuwa filed the underlying lawsuit against defendants,[4] alleging 24 causes of action, including two causes of action for breach of promissory note, two causes of action for fraudulent transfer, and two causes of action for conversion. After the parties engaged in substantial discovery, the court bifurcated the trial on Mitsuwa's claims into two phases. In May and June 2014, the court conducted the first phase as a bench trial to determine whether YCMC Holding and YTC Holding were the "alter egos" of the other defendants named in the June 2011 complaint. In April 2015, the court issued a statement of decision finding YCMC Holding and YTC Holding were the alter egos of the other defendants.

In early June 2015, Mitsuwa filed a motion for judgment on the pleadings of the two breach of promissory note causes of

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[4] Specifically, Mitsuwa named as defendants the following individuals and entities: (1) "C. FRED WEHBA, individually and as Trustee on behalf of the Cyle F. Wehba 2007 Irrevocable Trust"; (2) four members of the Wehba family in their individual capacities and in their capacities as trustees of various private trusts; (3) "BENTLEY FORBES HOLDINGS, LLC"; (4) "BENTLEY FORBES GROUP, LLC"; (5) "BENTLEY FORBES GROUP, INC."; (6) YCMC HOLDING, LLC; (7) "YCMC, LLC"; (8) YTC HOLDING, LLC; (9) "YTC, LLC"; (10) "MTCA, LLC"; and (11) "MTCA HOLDINGS, LLC." Wehba is the only defendant named in Mitsuwa's complaint who is a party to this appeal.

action alleged in the June 2011 complaint, seeking nearly $4 million against defendants as to each claim. Defendants did not oppose the motion. In late June 2015, the court granted Mitsuwa's motion for judgment on the pleadings of its two breach of promissory note causes of action.

2. The Settlement Agreement

In early November 2015, before the second phase of trial on Mitsuwa's complaint, defendants and Mitsuwa signed a "Settlement Agreement and General Release" (Agreement), agreeing to settle all of Mitsuwa's remaining claims against defendants.[5] Paragraph 2.1 of the Agreement provided that defendants "and each of them, agree to pay Mitsuwa the total amount of Fifteen Million Dollars ($15,000,000) to settle the Action." Under Paragraph 2.2 of the Agreement, defendants "agree[d] and stipulate[d] that the rights Mitsuwa is relinquishing by entering into this Agreement have a value in excess of $15,000,000." The Agreement also included a provision acknowledging that defendants' execution of the Agreement "shall not constitute or be construed as an admission of any guilt, liability, or wrongdoing on the part of any of the [defendants]."

Under Paragraph 3.1 of the Agreement, defendants were required to make two payments: the first payment, for $4 million, was due no later than March 15, 2016, and the second payment, for $6.5 million, was due no later than September 15, 2016. The Agreement stated that if defendants made both payments in full and on time, they would not be required to pay Mitsuwa the

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[5] By the time the parties signed the Agreement, 16 of the claims alleged in the June 2011 complaint remained unresolved.

remaining $4.5 million. However, if any defendants breached a provision of the Agreement or failed to make timely or complete payments, the full $15 million that they had agreed to pay, minus any payments they had already made, would become "immediately due and payable without notice[.]"

When they signed the Agreement, defendants also signed a "Stipulation for Judgment and Entry of Judgment" (Stipulation for Judgment). Per the terms of the Agreement, Mitsuwa could file the Stipulation for Judgment "on an *ex parte* basis on three-day's notice to [defendants'] counsel" if defendants breached any provision of the Agreement, including failing to make timely and complete payments under Paragraph 3.1. The Stipulation for Judgment provided that "upon *ex parte* application, the Court shall immediately … order that Judgment be entered in favor of [Mitsuwa] and against each and every Defendant, jointly and severally, in the amount of Fifteen Million Dollars ($15,000,000)."

3. Defendants' Default

Defendants made the first payment of $4 million on March 15, 2016, but they never made the second payment of $6.5 million. In October 2016, Mitsuwa filed an ex parte application for entry of a stipulated judgment. On October 14, 2016, the court granted Mitsuwa's ex parte application and entered a judgment in Mitsuwa's favor for $11,087,397.20 ($15 million minus $4 million, plus interest on the outstanding balance) (October 2016 Judgment).

On March 28, 2017, Mitsuwa served a Notice of Levy and a Writ of Execution (Levy) on YZB, the law firm representing Wehba in the underlying litigation. The Levy stated Mitsuwa had obtained a judgment against defendants for $11,272,765.24, plus interest accruing at a rate of $3,088.42 per day, and it informed

YZB it was required to turn over to the levying officer "[a]ny and all funds, accounts, or deposits held for or owed to any of the [defendants]."

4. Motion to Vacate the October 2016 Judgment

On April 19, 2017, Wehba moved to vacate the October 2016 Judgment under section 473, subdivision (d), and Civil Code section 3275, on the grounds that the judgment included a $4.5 million penalty for failing to make timely payments under the Agreement. Specifically, Wehba argued the provision of the Agreement allowing defendants to keep $4.5 million of the $15 million they had agreed to pay Mitsuwa if they made their first two payments in full and on time was an unenforceable liquidated damages provision that was "not reasonably related to the damages that Mitsuwa would be expected to actually suffer" if defendants breached the Agreement.[6] Mitsuwa opposed Wehba's motion.

On May 26, 2017, the court granted Wehba's motion to vacate the October 2016 Judgment, concluding it was based on an unlawful penalty in the Agreement. The court found there was no evidence that Mitsuwa made any effort to calculate whether $4.5 million was a reasonable estimation of the damages the company would suffer in the event defendants breached the Agreement. After finding the penalty provision was severable from the settlement agreement, the court denied Wehba's request to vacate the October 2016 Judgment and ordered Mitsuwa to file a proposed amended judgment reducing the amount of damages

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[6] The day after filing his motion to vacate, Wehba filed an ex parte application to stay execution of the October 2016 Judgment pending the hearing on the motion to vacate, which the court denied.

it was awarded in the original Judgment to $6.5 million plus interest.

5. The Amended Judgment and Mitsuwa's Enforcement Efforts

On May 31, 2017, the Los Angeles County Sheriff's Department informed Mitsuwa that YZB had yet to turn over any money or property in response to the Levy. On June 5, 2017, Mitsuwa filed a motion under section 701.020 for an order holding YZB liable for $697,465.95 in proceeds from the sale of Wehba's personal real estate that Mitsuwa claimed YZB was holding in trust for defendants.

On June 9, 2017, Mitsuwa filed a proposed amended judgment for $6,980,821.40. Wehba objected to Mitsuwa's proposed amended judgment, arguing the court lacked jurisdiction to amend the October 2016 Judgment.[7] Wehba claimed that "[w]here … a meritorious motion to vacate on the ground of judicial error is brought, the trial court's only recourse is to vacate the original judgment and enter a new judgment that does not contain the same error." Wehba also argued the proposed amended judgment improperly sought to award Mitsuwa prejudgment interest because the Agreement did not include any provision for interest on defaulted payments.

Around June 29, 2017, Wehba filed a "Petition for Hearing of Third Party Claim of Superior Security Interest or Lien and Order Setting Hearing Date," claiming YZB held a superior security interest in the proceeds from the sale of Wehba's property at issue in Mitsuwa's June 5, 2017 motion under section

[7] Wehba also filed a "renewed" ex parte application to stay execution of the judgment, which the court denied.

701.020. On June 30, 2017, Wehba filed an opposition to Mitsuwa's motion for an order holding YZB liable under section 701.020; YZB never filed an opposition to that motion.

On July 24, 2017, the court overruled Wehba's objections to Mitsuwa's proposed amended judgment. The court then entered an amended judgment reducing the $11,087,397.20 awarded in Mitsuwa's favor in the October 2016 Judgment to $6,980,821.40.

On July 28, 2017, the court granted Mitsuwa's motion under section 701.020 and issued an order finding YZB liable to Mitsuwa "in the amount of $697,465.95, or such greater amount subject to follow-up proof" (Post-Judgment Order).[8] On August 4, 2017, Mitsuwa served YZB with notice of entry of the Post-Judgment Order.

On August 24, 2017, Wehba filed a notice of appeal from the July 24, 2017 amended judgment, the Post-Judgment Order against YZB, and "all orders that are separately appealable[.]"[9] Mitsuwa timely cross-appealed from the July 24, 2017 amended judgment.

On October 19, 2017, Mitsuwa filed a motion under section 720.390 and "the Court's Order dated July 28, 2017," requesting the court enter judgment against YZB for $697,465.95 and issue an order requiring YZB to turn that money over to Mitsuwa. On October 31, 2017, Wehba filed an opposition and an "additional"

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[8] YZB has not provided a reporter's transcript of the July 24, 2017 hearing.

[9] In appeal case No. B286994, we granted Mitsuwa's request for judicial notice of the opening brief Wehba filed in appeal case No. B284741. In that brief, Wehba concedes that because "he is not aggrieved by the [Post-Judgment Order] against YZB[,] … he has no standing to appeal" that order.

opposition to Mitsuwa's motion for a judgment;[10] YZB did not file an opposition to that motion. On November 29, 2017, the court granted Mitsuwa's motion.[11] That same day, the court entered judgment against YZB in the amount of $697,465.95 and ordered YZB "to turn over to Mitsuwa the $697,465.95 of Judgment Debtors' funds still held by YZB, within ten (10) days of the date of this Judgment and Order" (November 2017 Judgment).

On December 14, 2017, YZB filed a notice of appeal from the Post-Judgment Order and the November 2017 Judgment. After filing its notice of appeal, YZB paid Mitsuwa the full amount due under the Post-Judgment Order and the November 2017 Judgment.

DISCUSSION

1. The October 2016 Judgment is valid and enforceable.

Mitsuwa contends the court erred in granting Wehba's motion to vacate the October 2016 Judgment because neither the judgment nor the Agreement on which it is based includes an unlawful penalty. We agree.

Under Civil Code section 1671, subdivision (b), "a provision in a contract liquidating the damages for the breach of the contract is valid unless the party seeking to invalidate the provision establishes that the provision was unreasonable under the circumstances existing at the time the contract was made." A

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[10] Specifically, the document Wehba filed was entitled, "Defendants' Opposition to Plaintiff's Motion Against Non-Party Young, Zinn & Bate LLP for: 1). Judgment Against YZB[;] and 2). Order."

[11] YZB has not provided a reporter's transcript of the November 29, 2017 hearing.

"liquidated damages clause will generally be considered unreasonable, and hence unenforceable[,] under [Civil Code] section 1671(b), if it bears no reasonable relationship to the range of actual damages that the parties could have anticipated would flow from a breach." (*Ridgley v. Topa Thrift & Loan Assn.* (1998) 17 Cal.4th 970, 977.)

Whether a predetermined amount to be paid upon a breach of contract is an enforceable liquidated damages provision or an unenforceable penalty under Civil Code section 1671, subdivision (b), is ordinarily a question of law that we review de novo. (*Jade Fashion & Co., Inc. v. Harkham Industries, Inc.* (2014) 229 Cal.App.4th 635, 646 (*Jade Fashion*).) To the extent the determination depends on disputed facts, however, we apply a substantial evidence standard of review. (*Krechuniak v. Noorzoy* (2017) 11 Cal.App.5th 713, 722–723.)

Mitsuwa asserts the Agreement did not contain an unenforceable penalty provision but rather, "by its structure and plain language," it included "a potential discount from the agreed settlement amount of $15 million." According to Mitsuwa, defendants agreed to pay $15 million to settle the parties' dispute and, if defendants made their first two payments under the Agreement on time and in full, they would be entitled to a $4.5 million discount. Such an arrangement is enforceable, Mitsuwa argues, because it merely incentivizes defendants to make complete and timely payments while obligating them to remain liable for the full amount they agreed to pay if they do not promptly and completely make the payments owed under the Agreement.

Jade Fashion resolved a nearly identical issue. A manufacturer agreed to sell garments to a buyer, who later

defaulted on its payment obligations. (*Jade Fashion*, *supra*, 229 Cal.App.4th at p. 639.) The parties reached an agreement that included a payment schedule for the full amount the buyer owed the manufacturer. (*Ibid.*) Under the agreement, if the buyer made all the required payments in full and on time, the manufacturer would discount $17,500 from the total amount owed. (*Ibid.*) The buyer made all the installment payments less $17,500. (*Ibid.*) Some of the payments were late, however, so the manufacturer sued the buyer to recover the outstanding $17,500. (*Ibid.*) After the trial court entered judgment in the manufacturer's favor, the buyer appealed, arguing the $17,500 discount was in fact an unlawful penalty under Civil Code section 1671, subdivision (b). (*Jade Fashion*, at pp. 645–646.)

Division Seven of this District affirmed the judgment, concluding the $17,500 discount was not an unenforceable penalty, let alone liquidated damages. (*Jade Fashion*, *supra*, 229 Cal.App.4th at p. 649.) Rather, the discount "was part of [the original] debt which [the buyer] specifically admitted it owed to the [manufacturer.]" (*Ibid.*) The court explained that the payment plan did not increase the amount of money the buyer owed if it defaulted on any of the agreed-upon payments, since the $17,500 discount was included in the total amount that the buyer "admitted was due and owing, and which it agreed to repay in accordance with a specified payment schedule." (*Id.* at p. 650.) The payment plan, therefore, "did not purport to increase the amount of the original debt owed by [the buyer] if any future payments were late." (*Ibid.*)

Under those circumstances, Division Seven explained, "Civil Code section 1671's restriction on liquidated damages clauses d[id] not apply, and the enforceability of the $17,500

discount provision d[id] not depend on whether it bore a reasonable relationship to the actual damages suffered from the late payments." (*Jade Fashion*, *supra*, 229 Cal.App.4th at p. 649.) Since the buyer "expressly agreed to pay the entire balance of [the settlement agreement] and to take the $17,500 discount only if it paid each weekly installment when due, [the manufacturer] suffered actual damages of $17,500 when [the buyer] failed to timely make its payments and then refused to pay the entirety of the debt owed." (*Ibid.*)

Like the agreement in *Jade Fashion*, the Agreement in this case expressly obligates defendants to pay Mitsuwa the entire amount for which the parties agreed to settle their dispute. In Paragraph 2.1 of the Agreement, defendants "agree[d] to pay Mitsuwa the total amount of Fifteen Million Dollars ($15,000,000) to settle the Action." Likewise, on the same day they signed the Agreement, defendants also signed the "Stipulation for Judgment," agreeing that Mitsuwa was entitled to a $15 million judgment to settle the company's claims against defendants. Based on the language of these provisions, it is clear that defendants agreed they were liable to Mitsuwa for $15 million when they signed the Agreement and the Stipulation for Judgment.

The fact that defendants could have paid only $10.5 million if they complied with the Agreement's payment schedule does not mean the $4.5 million difference between that amount and the full $15 million defendants agreed to pay constitutes a penalty. Instead, like the $17,500 at issue in *Jade Fashion*, the $4.5 million is simply a discount from the total obligation defendants owed Mitsuwa that was intended to incentivize them to make timely and complete payments under the Agreement. In

other words, the $4.5 million has always been part of the $15 million defendants expressly admitted they owed and agreed to pay Mitsuwa to settle their dispute. As such, the provision of the Agreement requiring defendants to pay the full $15 million is neither a liquidated damages clause nor a penalty. The enforceability of that provision, therefore, is not governed by Civil Code section 1671, subdivision (b). (See *Jade Fashion*, *supra*, 229 Cal.App.4th at p. 649.)

The court relied on two Court of Appeal decisions to find the Agreement and the October 2016 Judgment include an unenforceable penalty: *Sybron Corp. v. Clark Hosp. Supply Corp.* (1978) 76 Cal.App.3d 896 (*Sybron*) and *Greentree Financial Group, Inc. v. Execute Sports, Inc.* (2008) 163 Cal.App.4th 495 (*Greentree*). On appeal, Wehba relies on *Greentree* as well as two other Court of Appeal decisions—*Purcell v. Schweitzer* (2014) 224 Cal.App.4th 969 (*Purcell*) and *Vitatech Internat., Inc. v. Sporn* (2017) 16 Cal.App.5th 796 (*Vitatech*)—to argue the court correctly found the Agreement and the October 2016 Judgment contain an unenforceable penalty. The parties in each of those cases, however, negotiated a settlement agreement that required the defendant to pay a fixed amount of damages in the event of a breach or default that was *disproportionately higher* than the amount the defendant had agreed to pay to settle the parties' dispute.

For example, in *Greentree,* the plaintiff sued the defendant for failing to pay $45,000 due under a financial services contract. (*Greentree*, *supra*, 163 Cal.App.4th at p. 498.) The parties signed a stipulation, agreeing to settle their dispute for $20,000. Under the terms of the stipulation, if the defendant defaulted on any of the required payments, the plaintiff could obtain a judgment for

the entire $45,000 sought in its complaint plus attorney's fees, costs, and interest, and minus any payments the defendant had made. (*Ibid*.) After the defendant failed to make the first payment, the plaintiff obtained a judgment for $61,000, which included $45,000 in damages plus interest and attorney fees. (*Ibid*.)

The Court of Appeal reversed the judgment, holding it constituted an unlawful penalty because the "amount in the judgment bears no reasonable relationship to the range of actual damages the parties could have anticipated would flow from a breach of their settlement agreement." (*Greentree*, *supra*, 163 Cal.App.4th at p. 497.) In the reviewing court's opinion, "[t]he amount of the judgment, which awarded ... approximately $40,000 more than the settlement amount, does not merely compensate [the plaintiff]—it rewards [the plaintiff] by penalizing [the defendant]." (*Id.* at p. 500.)

In reaching its decision, the court in *Greentree* explained that the relevant breach to be analyzed is the breach of the settlement agreement, not the breach of the original contract between the parties leading to their underlying dispute. (*Greentree*, *supra*, 163 Cal.App.4th at p. 499.) The court reasoned that the parties "did not attempt to anticipate the damages that might flow from a breach of the [settlement agreement]. Rather, they simply selected the amount [the plaintiff] had claimed as damages in the underlying lawsuit, plus prejudgment interest, attorney fees, and costs." (*Ibid*.) The court observed that "the judgment would have been enforceable if it had been designed to encourage [the defendant] to make its settlement payments on time, and to compensate [the plaintiff] for its loss of use of the

money plus its reasonable costs in pursuing the payment." (*Id.* at p. 500.)

In *Purcell,* a lender sued a borrower after the borrower defaulted on an $85,000 loan. (*Purcell, supra,* 224 Cal.App.4th at p. 971.) The parties executed a settlement agreement, in which the borrower agreed to pay the lender $38,000 plus interest in installment payments over 24 months. (*Ibid.*) If the borrower was delinquent in making any payment, the lender could obtain a judgment against the borrower for the full amount due under the original loan. (*Ibid.*) The settlement agreement also stated that the amount the borrower would owe upon default was " 'an agreed upon amount of monies actually owed ... by the [borrower] to the [lender] and *is neither a penalty nor is it a forfeiture*,' " and that it took into account " 'the economics associated with proceeding further with this matter,' " including attorney fees and the costs of litigation. (*Id.* at p. 972.)

After the borrower missed one payment of $750, the lender applied for a judgment against the borrower. (*Purcell, supra,* 224 Cal.App.4th at pp. 972–973.) The lender then accepted the borrower's late payment of the $750, which was made six days after it was due. (*Id.* at p. 972.) Seven days after the payment was made, the court entered judgment in the lender's favor for nearly $60,000, which stated that all but nearly $800 of the amount awarded to the lender constituted " 'punitive damages.' " (*Id.* at p. 973.) After the judgment was entered, the borrower continued to make regular payments under the settlement agreement, which the lender accepted. (*Ibid.*) The settlement agreement was paid in full less than a year after the judgment was entered. (*Ibid.*)

Relying on *Greentree*, the Court of Appeal held the judgment was an unenforceable penalty because it "bore no reasonable relationship to the damages that it could be expected that [the lender] would suffer as a result of a breach by [the borrower]. … Indeed, [the lender] suffered no damages at all because judgment was entered … *after* payment was accepted[.]" (*Purcell, supra,* 224 Cal.App.4th at pp. 975–976.) The court rejected the lender's argument that the parties had agreed that $85,000 reflected the "economics associated with" continuing to litigate the parties' dispute, since that provision "bore no reasonable relationship" to the amount of damages the lender would expect to suffer from a breach. (*Id.* at p. 976.) According to the reviewing court, the "language in the stipulation seeking to tie the $85,000 to the economics of proceeding further with the matter was an obvious attempt to circumvent the public policy expressed in [Civil Code] section 1761." (*Ibid.*) The court also held the judgment was improper because it awarded the lender " 'punitive damages,' " which "are not recoverable in breach of contract actions." (*Ibid.*)

Similarly, in *Sybron* and *Vitatech*, the parties agreed to settle their disputes for values that were significantly lower than the amounts of liquidated damages awarded in their settlement agreements. In *Sybron*, the parties agreed to settle their dispute for $72,000, but they included a liquidated damages provision awarding the plaintiff $100,000 if the defendant breached the settlement agreement. (*Sybron*, *supra*, 76 Cal.App.3d at pp. 898–900.) And in *Vitatech,* the parties agreed on a $75,000 settlement amount, while including a provision awarding the plaintiff nearly $300,000 in liquidated damages if the defendant breached the

settlement agreement. (*Vitatech*, *supra*, 16 Cal.App.5th at pp. 801–802.)

This case is distinguishable from *Greentree*, *Vitatech*, *Purcell*, and *Sybron*. Unlike the breaching parties in those cases, defendants in this case did not agree to settle the underlying dispute for an amount that was disproportionately lower than the amount Mitsuwa could recover as liquidated damages for a breach of the Agreement. Rather, defendants expressly agreed to pay Mitsuwa the same amount of money to settle their dispute ($15 million) that Mitsuwa would be entitled to recover if defendants breached the Agreement ($15 million less any payments defendants made prior to the breach). *Sybron*, *Purcell*, *Greentree*, and *Vitatech* therefore do not compel a finding that the original judgment was based on an unenforceable penalty provision.

In sum, because the October 2016 Judgment merely obligates defendants to pay Mitsuwa the same amount they had agreed to settle the parties' dispute, the court erred in finding the original judgment was based on an unenforceable penalty in the Agreement. Because the October 2016 Judgment is valid and enforceable, the court must reinstate that judgment.[12]

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[12] Since we conclude the court erred in granting Wehba's motion to vacate the October 2016 Judgment and direct the court to reinstate that judgment, we need not address the argument raised by Wehba in appeal number B284741 and by YZB in appeal number B286994 that the court erred in amending, rather than vacating, the judgment after it granted Wehba's motion. For the same reason, we also need not address Wehba's argument that the court erred in awarding Mitsuwa prejudgment interest as part of the July 24, 2017 amended judgment. It is also unnecessary to address Mitsuwa's argument that Wehba's motion to vacate the October 2016 Judgment was untimely.

2. YZB's appeals from the Post-Judgment Order and the November 2017 Judgment must be dismissed.

YZB contends the court lacked jurisdiction to enter the Post-Judgment Order and the November 2017 Judgment. Specifically, YZB asserts that if the October 2016 Judgment was void, the Levy, on which both the Post-Judgment Order and the November 2017 Judgment were based, would have been ineffective, rendering both the Post-Judgment Order and the November 2017 Judgment void. YZB also contends the court had no power to enter the November 2017 Judgment because section 701.020 does not authorize a court to enter a judgment pursuant to its terms and the court was stayed from entering any additional orders and judgments once Wehba filed his notice of appeal from the July 24, 2017 amended judgment in August 2017.

After Mitsuwa and YZB filed their briefs, we asked them to show cause why YZB's appeal from the Post-Judgment Order should not be dismissed as untimely. We also asked the parties to address whether YZB's appeal from the November 2017 Judgment should be dismissed as moot if we dismiss YZB's appeal from the Post-Judgment Order. Both parties submitted supplemental briefs addressing the issues raised in the order to show cause. For the reasons set forth below, we dismiss both of YZB's appeals and discharge the order to show cause.

2.1. YZB's appeal from the July 28, 2017 order is untimely.

Under subdivision (a)(1) of rule 8.104 of the California Rules of Court (Rule 8.104), "a notice of appeal must be filed on or before the earliest of: [¶] (A) 60 days after the superior court clerk serves on the party filing the notice of appeal a document entitled

'Notice of Entry' of judgment or a filed-endorsed copy of the judgment, showing the date either was served; [or] [¶] (B) 60 days after the party filing the notice of appeal serves or is served by a party with a document entitled 'Notice of Entry' of judgment or a filed-endorsed copy of the judgment, accompanied by proof of service; or [¶] (C) 180 days after entry of judgment." (Rule 8.104(a)(1); see also Rule 8.104(e) ["As used in (a) …, 'judgment' includes an appealable order if the appeal is from an appealable order."].) To trigger the shorter 60-day period under Rule 8.104(a)(1), the superior court clerk or one of the parties must serve on the appealing party a document that either is entitled " 'notice of entry' " of order or is a "filed-endorsed" copy of the order, and which indicates the date on which the document was served. (Rule 8.104(a)(1)(A)–(B); see also *Alan v. American Honda Motor Co., Inc.* (2007) 40 Cal.4th 894, 905.)

The filing of a timely notice of appeal is a jurisdictional prerequisite. (*Bourhis v. Lord* (2013) 56 Cal.4th 320, 324–325.) " 'In the absence of statutory authorization, neither the trial nor appellate courts may extend or shorten the time for appeal [citation], even to relieve against mistake, inadvertence, accident, or misfortune [citations.]' " (*Hollister Convalescent Hosp., Inc. v. Rico* (1975) 15 Cal.3d 660, 666.) If the notice of appeal is not timely filed, the appeal must be dismissed. (*Silverbrand v. County of Los Angeles* (2009) 46 Cal.4th 106, 113.)

On July 28, 2017, the court entered the Post-Judgment Order, which found YZB was liable to Mitsuwa for $697,465.95 "or such greater amount subject to follow-up proof." As YZB acknowledges in its opening brief, the Post-Judgment Order is appealable under section 904.1, subdivision (a)(2), as a post-judgment order made to enforce a judgment. (See *Jones v. World*

Life Research Institute (1976) 60 Cal.App.3d 836, 839 [" ' "Orders made to enforce a judgment or to prevent its enforcement are appealable." ' "].) On August 4, 2017, Mitsuwa's counsel served YZB with notice of entry of the Post-Judgment Order. YZB therefore had 60 days from August 4, 2017 to file its notice of appeal from that order. (See Rule 8.104(a)(1)(B).) YZB did not file its notice of appeal until December 14, 2017, or 133 days after Mitsuwa's counsel served YZB with the notice of entry of the Post-Judgment Order. YZB's appeal from that order is therefore untimely.

YZB contends its appeal from the Post-Judgment Order is timely because the order is based on the October 2016 Judgment, which YZB claims is void. According to YZB, if the October 2016 Judgment is void, any order based on that judgment, including the Post-Judgment Order, must also be void. YZB claims that because a void order or judgment can be attacked at any time, "an appeal of a void order can not be untimely." This argument lacks merit. As we explained above, the October 2016 Judgment was valid and enforceable. Consequently, the Post-Judgment Order is not void for any of the reasons that YZB asserts. We therefore need not address YZB's argument that an appeal from a void order or judgment can never be untimely.

2.2. YZB's challenge to the November 29, 2017 judgment is moot.

"California courts will decide only justiciable controversies." (*Wilson & Wilson v. City Council of Redwood City* (2011) 191 Cal.App.4th 1559, 1573.) A justiciable controversy no longer exists after an appeal becomes moot. (*Id.* at p. 1574.) An appeal is moot where, through no fault of the respondent, an event occurs that renders it impossible for the reviewing court to

provide the appellant effective relief. (*Ebenstainer Co., Inc. v. Chadmar Group* (2006) 143 Cal.App.4th 1174, 1178–1179.)

YZB's appeal from the November 2017 Judgment is moot because, even if we were to reverse that judgment, we would not be able to provide YZB any effective relief. The November 2017 Judgment and the Post-Judgment Order award Mitsuwa the same amount of money: $697,465.95. And in its supplemental brief, YZB acknowledges it has already complied with the November 2017 Judgment *and* the Post-Judgment Order when it paid Mitsuwa $697,465.95 after the judgment and the order were issued. Since we have dismissed YZB's appeal from the Post-Judgment Order, that order is final and remains undisturbed. As such, even if we were to reverse the November 2017 Judgment, YZB would still be liable for $697,465.95. Because YZB has not identified any other relief it would be entitled to if we were to reverse the November 2017 Judgment, we dismiss as moot its appeal from that judgment.

2.3. YZB forfeited any arguments concerning the validity of the Post-Judgment Order and the November 2017 Judgment.

Even assuming YZB's appeals from the Post-Judgment Order and the November 2017 Judgment should not be dismissed, YZB failed to preserve any of the arguments it raises on appeal challenging the court's rulings. To preserve an argument for appeal, the party must oppose the challenged ruling, order, or judgment below. (*Bell v. American Title Ins. Co.* (1991) 226 Cal.App.3d 1589, 1602 ["Failure to register a proper and timely objection to a ruling or proceeding in the trial court waives the issue on appeal."].) If a party fails to file an opposition to the motion leading to the challenged order or judgment, and

that party also does not provide a reporter's transcript of the underlying proceeding, it waives all arguments against the challenged order or judgment. (*Southern California Gas Co. v. Flannery* (2016) 5 Cal.App.5th 476, 483, fn. 7 (*Flannery*).)

As we noted above in the procedural history, Wehba filed oppositions to Mitsuwa's motions for entry of the Post-Judgment Order and the November 2017 Judgment, but YZB never filed its own oppositions to those motions. As Wehba concedes in his opening brief in appeal case No. B284741, he lacks standing to appeal the Post-Judgment Order because he was not aggrieved by it. (*In re Vanessa Z.* (1994) 23 Cal.App.4th 258, 261 ["An appellant cannot urge errors which affect only another party who does not appeal"]; *Calhoun v. Vallejo City Unified School Dist.* (1993) 20 Cal.App.4th 39, 42 [client lacks standing to appeal sanctions order issued against his attorney].) Wehba also lacked standing below to oppose Mitsuwa's motions for entry of the Post-Judgment Order and the November 2017 Judgment because he was not named as a party to those motions and he would not have been affected by any orders or judgments that resulted from them. (See *Cesar V. v. Superior Court* (2001) 91 Cal.App.4th 1023, 1034–1035 [" '[W]hether one has standing in a particular case generally revolves around the question whether that person has rights that may suffer some injury, actual or threatened.' "].) Because YZB never filed its own oppositions to Mitsuwa's motions, and because YZB has not provided transcripts of the hearings on those motions, YZB forfeited any arguments on appeal challenging the Post-Judgment Order and the November 2017 Judgment. (See *Flannery*, *supra*, 5 Cal.App.5th at p. 483, fn. 7.)

DISPOSITION

The court's May 26, 2017 order granting Wehba's motion to vacate the judgment entered on October 14, 2016 is reversed, and the court is directed to reinstate that judgment. YZB's appeals from the post-judgment order entered on July 28, 2017 and the judgment entered on November 29, 2017 are dismissed. The May 20, 2019 order to show cause is discharged. Mitsuwa is entitled to its costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

LAVIN, Acting P. J.

WE CONCUR:

EGERTON, J.

DHANIDINA, J.